

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad Company  
(Former Missouri Pacific Railroad Company)

Case No: 140  
Award No: 140

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. D. Calhoun, by letter dated May 10, 2019, for alleged violation of Rules 1.6: Conduct – Negligent, 136.7.5: Safe Traveling Distance Between Machines and 42.2.2: Other Speed Requirements was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP512JF19/1722841 MPR).
2. As a consequence of the violation referred to in Part 1 above, we request:

‘...the removal of the alleged violations of Rules 1.6 Conduct - Negligent, and that paragraph which stipulates that “ any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated, “ 136. 7.5: Safe Traveling Distance Between Machines: 42.2.2 Other Speed Requirements, and the Discipline of Dismissal from Service of the Union Pacific Railroad, and to be removed from the Claimant's Personnel Record. Also, to be paid and compensated for any and all lost time at the Claimant's straight time rate of pay, and any and all overtime to be paid at his respective overtime rate of pay that his respective Gang was afforded, and to the Employee performing the Claimant's work had he not been unjustly, and excessively, to include holidays, and any and all lost time to be credited to Railroad Retirement, hospitalization, to include physician's office visits, dental, prescriptions, and vision beginning on March 31, 2019, through and including on a continuous basis until this matter is settled. Also, to include any and all expenses the Claimant may have acquired, to include meals, lodging, and mileage at the negotiated rate of \$ .58 cents a mile from Mr. Calhoun's place of residence, 134 Richard Street, Lake Charles, Louisiana 70601, to the Hawthorn suites, 2401 Brookhollow Plaza Drive, Arlington, Texas, And returning to Mr. Calhoun's place of residence for attending the Formal Investigation on April 24, 2019, account the Carrier unjustly, and excessively charged and disciplined the Claimant without sufficient, supportive evidence, and not affording him ma (sic) Fair and Impartial Investigation forcing him in worse position, causing a loss of work opportunity, a loss of wages, and causing him financial hardship.

\* \* \*

The Organization also requests that within such time in which the Claimant is reinstated back to active service that he would not be subjected to any additional probation under the Union Pacific MAPS Policy, specifically “Rule 3.7 Arbitration Decision” in which case the Carrier can revert employees (sic) status to a second triggering/training event with a thirty six (36) month retention period.’ (Employees’ Exhibit ‘A-3’).”

### FINDINGS

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

The Claimant was disciplined pursuant to a Notice of Investigation dated April 3, 2019, Investigation held April 24, 2019, “... to develop the facts and place your responsibility, if any, in connection with the below charge.

On 3/31/2019, at the location of Round Rock, TX, near Milepost 160.1, Austin Subdivision, at approximately 12:45 hours, while employed as a M/O R (Cat) Tamper, you allegedly On 3/31/2019, you allegedly were careless of safety when you failed to stop your equipment within half the range of vision to be seen clear by not travelling at a safe enough distance to prevent an On-Track Collision with the One-Pass Plow you were following. This is a possible violation of the following rule(s) and/or policy:

1.6: Conduct – Careless  
136.7.5: Safe Traveling Distance Between Machines  
42.2.2: Other Speed Requirements”

The parties’ dispute concerning the Notice of Investigation Rule 1.6 charge is discussed below.

In a discipline letter dated May 10, 2019, the Carrier found that “After carefully considering the evidence adduced at the hearing, I find that the evidence more than substantially supports the charges against you. The following charge has been sustained:

On 3/31/2019, while employed as a M/O R (Cat) Tamper, you On 3/31/2019, you allegedly were careless of safety when you failed to stop your equipment within half the range of vision to be seen clear by not travelling at a safe enough distance to prevent an On-Track Collision with

the One-Pass Plow you were following. This is a violation of the following rule(s) and/or policy:

- 1.6: Conduct – Negligent
- 136.7.5: Safe Traveling Distance Between Machines
- 42.2.2: Other Speed Requirements

Based on your current record, you are hereby dismissed from all service with the Union Pacific Railroad.

The Organization appealed the discipline and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties' respective positions, whether or not specifically addressed herein.

The Organization raised a procedural defense which the Board finds persuasive under the facts and circumstances of this record. The Notice of Investigation provided by the Carrier prior to the Investigation stated the charge of Rule 1.6 Careless (and the two other charged Rules). Shortly after the start of the Investigation the Carrier attempted to introduce an amended/revised Notice of Investigation charging Rule 1.6 Negligent (and the two other charged Rules) instead of Rule 1.6 Careless. The Organization objected, stating on the record that it never received any such amended/revised Notice of Investigation. The Hearing Officer examined the Organization's Notice of Investigation and confirmed on the record that Rule 1.6 Negligent did not appear thereon. The Carrier provided no documentation to support its assertion that it complied with Rule 22(c)(1) prior to the Investigation with respect to its purportedly amended/revised Notice of Investigation. Rule 22(c)(1) requires the Carrier to provide "... precise charges sufficiently in advance...". In the cases cited by the parties in their respective submissions, Rule 1.6 charges state the precise Rule 1.6 subsection charged. Based on the above, the Board finds that the Carrier's amended/revised Notice of Investigation did not comply with Rule 22(c)(1).

Importantly, the Hearing Officer granted the Organization's objection and specifically excluded Negligent from the Investigation. However, despite the Hearing Officer having excluded Negligent, the Carrier's Notification of Discipline Assessed found Claimant in violation of Rule 1.6 Negligent (and the two other charged Rules).

The Charging Officer testified that:

Rule 1.6 is the reason that I pulled these employees from service pending the outcome of this investigation. Other speed requirements 42.2 and 136.7.5 are critical rules. Our Company has policies and procedures in place **if just those two things are present. We would typically just have a critical rule. We would train the employee, send him home for the day to think about his actions pay him. Pay him, train him, bring him in for additional training and try to correct that behavior.**

And with 1.6, because I did feel that this was a disregard of safety for their selves and others. It also demonstrates repeated safety rule infractions through either inability or unwillingness to comply with safety rules.

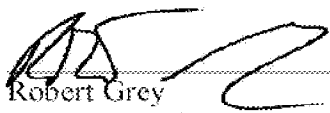
The **negligence** shown in this collision demonstrates a lack of action by Dean and Calhoun to prevent damage to Company property and prevent injury to them or their fellow workers. [**Emphasis added**].

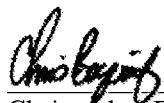
The Board finds that quite to the contrary, the record does *not* demonstrate “disregard of safety for their selves and others . . . [or] . . . repeated safety rule infractions through either inability or unwillingness to comply with safety rules.” Indeed, on the date of the collision, which Claimant unsuccessfully attempted to avoid, Claimant had 26 years and 10 months of completely unblemished service, with no prior discipline, collision, or safety violation of record, whatsoever.

The Board finds substantial evidence in the record for the Carrier’s determination of Claimant’s culpability on the Rule 136.7.5 and Rule 42.2.2 charges. Therefore, in accordance with the Charging Officer’s above-quoted testimony, the Board is compelled to find that Claimant’s dismissal from service was improper.

#### AWARD

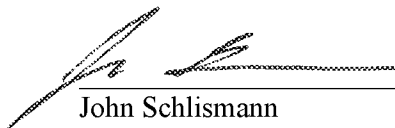
Claim sustained in accordance with the Findings. Pursuant to Rule 22(f) of the parties’ Agreement Claimant is reinstated to service at Claimant’s former position, with full seniority unimpaired, and afforded the remedy provided therein, including reimbursement for any net loss of compensation, at MAPS Training 1 status with a 12-month retention period. The Carrier is directed to comply with this Award on or before 30 days following the date by which any two members of the Board have affixed their signatures hereto.

  
Robert Grey  
Neutral Member



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Christopher Bogenreif  
Carrier Member



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John Schlismann  
Organization Member

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January 19, 2022

Dated